August 23, 2001
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SUPREME COURT, U.S.
FILED
AUG 23 2001
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No. 00-1073

In the Supreme Court of the United States

OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, AKA OWASSO PUBLIC SCHOOLS, ET AL., PETITIONERS

v.

KRISTJA J. FALVO, PARENT AND NEXT FRIEND OF HER MINOR CHILDREN, ELIZABETH PLETAN, PHILIP PLETAN AND ERICA PLETAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. 1232g(b)(1) (1994 & Supp. V 1999), prohibits the furnishing of federal funds to an educational institution that has a policy or practice of releasing, without parental consent, students' "education records," which are defined by FERPA as "those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. 1232g(a)(4)(A). The question presented is:

Whether allowing students to grade each other's homework and tests as their teacher goes over the correct answers aloud in class violates FERPA's prohibition against the release of "education records."

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INTEREST OF THE UNITED STATES

This suit was filed by respondent, the parent of three students in the petitioner school district, alleging that petitioners violated the prohibition against release of her children's "education records" under the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. 1232g(f). FERPA applies to schools and educational agencies that receive financial assistance under federal education programs administered by the Secretary of Education. FERPA directs the Secretary of Education to "take appropriate actions to enforce" FERPA and to investigate, review, and adjudicate alleged violations of the statute. 20 U.S.C. 1232g(g). At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. *Statutory framework*

In 1974, Congress enacted the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g(b)(1) (1994 & Supp. V 1999) to provide parents with access to their children's "education records" and to protect the children's rights of privacy by limiting the release of such records without parental consent.[1] FERPA requires schools and educational agencies to comply with its requirements as a condition to receiving financial assistance under federal education programs administered by the Secretary of Education. See 20 U.S.C. 1232g(a)(3); 34 C.F.R. 99.1.

FERPA first provides that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in [20 U.S.C. 1232g(a)(5)[2]]) of students without the written consent of their parents," except in certain statutorily specified circumstances. 20 U.S.C. 1232g(b)(1) (1994 & Supp. V 1999); see also 20 U.S.C. 1232g(b)(2). The statute allows release of "education records," without parental consent, to other teachers and school officials who have been determined by the institution to have legitimate educational interests, officials of other schools in which the student seeks to enroll, certain state and federal educational and law enforcement officials, persons

[1] In the case of a student who has reached age 18 or "is attending an institution of postsecondary education," the rights accorded by FERPA belong to the student rather than the parents. See 20 U.S.C. 1232g(d).

[2] "[D]irectory information" includes such information as the student's name, address, date and place of birth, major field of study, participation in officially recognized activities and sports, dates of attendance, and degrees and awards received. 20 U.S.C. 1232g(a)(5); 34 C.F.R. 99.3.

designated in a subpoena for law enforcement purposes, victims of certain crimes at a postsecondary institution, and educational testing, financial aid, and accrediting organizations. 20 U.S.C. 1232g(b)(1)(A)-(J) (1994 & Supp. V 1999); 20 U.S.C. 1232g(b)(6)(A) (Supp. V 1999). The institution must "maintain a record, kept with the education records of each student," that identifies each organization, agency, and individual (except other school officials, including teachers of the same school or local education agency) that requests or obtains access to the education records and specification of their legitimate interest in obtaining such information. 20 U.S.C. 1232g(b)(4)(A); see 34 C.F.R. 99.32.

FERPA also requires a school to make "education records" of students available to their parents for inspection and review. Thus, FERPA specifies that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution . . . the right to inspect and review the education records of their children." 20 U.S.C. 1232g(a)(1)(A); see also 20 U.S.C. 1232g(a)(1)(B) (applying inspection and review requirements to State educational agencies).

Finally, schools that receive federal financial assistance under federal education programs administered by the Secretary of Education must also provide parents an opportunity to challenge the accuracy of their child's "education records." Parents must be afforded a hearing "to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a

written explanation of the parents respecting the content of such records." 20 U.S.C. 1232g(a)(2).

The term "education records" is defined by FERPA to mean:

> those records, files, documents, and other materials which–
>
> (i) contain information directly related to a student; and
>
> (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. 1232g(a)(4)(A). FERPA excludes from that definition several specific categories of records. The first exception is for "records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute." 20 U.S.C. 1232g(a)(4)(B)(i). Other exceptions cover certain law enforcement, employment, and medical records. 20 U.S.C. 1232g(a)(4)(B)(ii) - (iv).

2. *Factual and procedural background.*

a. Respondent Kristja Falvo is the mother of three children who are enrolled in petitioner Owasso Independent School District No. I-011, in a suburb of Tulsa, Oklahoma. During the 1997-1998 and 1998-1999 school years, respondent objected to the practice of teachers in her children's classes having students grade one another's homework and tests while the teacher went over the correct answers in class and, after the students received back their own papers, having the students call out their grades to the teacher. Pet. App. A3, B2. Respondent complained about the practice to school counselors and to the school district superintendent, claiming that it "severely embarrassed her children by

allowing other students to learn their grades." *Id.* at A3. Respondent was informed that her children had the option of reporting their grades to the teacher confidentially, but the school district declined to prohibit the student grading of schoolwork. *Id.* at A3-A4.

b. In October 1998, respondent filed the instant action in the United States District Court for the Northern District of Oklahoma, under 42 U.S.C. 1983 (1994 & Supp. V 1999). She alleged that the challenged grading practice violated FERPA and sought damages and declaratory and injunctive relief against the Owasso School District and various school and school district officials. Pet. App. A4.

The district court, ruling on cross-motions for summary judgment, entered judgment for petitioners. Pet. App. B1-B6.[3] The district court held that allowing a student to grade the paper of another student and to have students call out their grades in class does not violate FERPA. *Id.* at B2-B4. The court relied (*id.* at B2-B3) on the Department of Education's interpretation of FERPA set forth in a letter dated July 15, 1993, from the Department's Family Policy Compliance Office (see *id.* at F3-F6) that FERPA does not prohibit the practices at issue here. The court noted that the Department of Education is the agency charged with enforcing FERPA, see 20 U.S.C. 1232g(f) and, as such, its interpretation of the statute "is entitled to deference if it is

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[3] On October 16, 1998, in an order denying respondent's request for a temporary restraining order, the court stated that, for purposes of that motion, it was following the holdings of two other circuits that a plaintiff may bring a FERPA claim under 42 U.S.C. 1983 (1994 & Supp. V 1999). See Pet. App. C4 (citing *Fay* v. *South Colonie Cent. Sch. Dist.*, 802 F.2d 21 (2d Cir. 1986); *Tarka* v. *Cunningham*, 917 F.2d 890 (5th Cir. 1990)). Petitioners did not raise that issue on appeal, but the court of appeals addressed the issue sua sponte and reached the same conclusion as the district court. Pet. App. A10-A16. Petitioners did not seek review of that ruling in their certiorari petition.

reasonable and not in conflict with the expressed intent of Congress." Pet. App. B3 (quoting *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985)). The court rejected respondent's contention that it should adopt the definition of "maintain" in the Privacy Act of 1974, 5 U.S.C. 552a(a)(3), which includes "collect," "use," and "disseminate" material. The court emphasized that Congress did not choose to incorporate that special definition into FERPA. The court instead construed "maintain" in accordance with its ordinary meaning of "preserve" or "retain" and held that the Department of Education's interpretation of FERPA was reasonable in light of that construction and did not conflict with the expressed intent of Congress. Pet. App. B4.[4]

c. The court of appeals reversed the judgment of the district court on the FERPA claim. The court first concluded that the terms "education records" and "maintain" are "clear from the statute itself" and that deference therefore was not due the Department of Education's interpretation under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). Pet. App. A18-A19. The court further held that, in any event, *Chevron* deference was not owed to that interpretation because it was contained in an opinion letter. *Id.* at A19 (citing *Christensen* v. *Harris County*, 529 U.S. 576, 586-587 (2000)). The court recognized that such an interpretive letter is "'entitled to respect' under * * * *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)," but the court found the letter to have minimal persuasive power under *Skidmore*. *Id.* at A19-A20.

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[4] The district court also rejected respondent's contention that the grading practices violated the Fourteenth Amendment, holding that a student's "interim tests and homework assignments" "are not 'highly personal' matters worthy of constitutional protection." Pet. App. B5. The court of appeals affirmed that ruling, *id.* at A6-A10, and it is not at issue here.

Turning to its own analysis of the statutory terms, the court stated that the only disagreement was over whether the grades placed by one student on the paper of another are "maintained . . . by a person acting for [an educational] agency or institution," for purposes of the second element of the statutory definition of the term "education records." 20 U.S.C. 1232g(a)(4)(A)(ii). Pet. App. A21. The court noted that at least some of the grades that are reported to the teacher are then recorded in the teacher's grade book. The court concluded that the grades become education records at least at that time because, in its view, a teacher's grade book and the grades it contains are "maintained . . . by a person acting for" an educational institution and therefore are "education records." Pet. App. A21-A24. The court then concluded that the grades are also "maintained . . . by a person acting for" the school, and therefore are "education records," even at what the court acknowledged to be "the more preliminary stage when one student simply writes the grade of a fellow student on homework and test papers." *Id.* at A24. The court reasoned that when one student writes the grade of another student on the homework or test, the correcting student is a "person acting for [an educational] agency or institution." *Ibid.* (quoting 20 U.S.C. 1232g(a)(4)(A)(ii)). And the court held that the student is "maintain-[ing]" the grade by marking the homework or test paper, "because the student is preserving the grade until the time it is reported to the teacher for further use." *Ibid.*

The court rejected petitioners' submission that other provisions of FERPA demonstrate that Congress did not intend to include in the definition of "education records" the student grading of other students' work under the auspices of an individual teacher. Pet. App. A25-A26. Petitioners argued that a broad definition of "education records" that includes student work graded by another student is inconsistent with the statutory requirement that educational institutions pro-

vide parents with a right to a hearing to challenge education records, 20 U.S.C. 1232g(a)(2), and maintain a record of all persons who have requested or obtained access to a student's education records, 20 U.S.C. 1232g(b)(4)(A). The court explained that "Congress could have sensibly intended to provide parents a means to challenge the accuracy of grades on individual homework and test papers," Pet. App. A26, and that schools could continue the practice of having a central custodian keep records of who was granted access even though such papers remain under the individual teacher's classroom supervision, *id.* at A27-A28.[5]

d. On October 4, 2000, the court entered an order denying petitioners' petition for rehearing and suggestion for en banc review. Pet. App. D1-D6.

Four judges dissented from the denial of rehearing en banc. Pet. App. D2-D6. Those judges questioned how grades on individual student papers could be education records when, in their view, even a teacher's grade book is normally not an education record, except in limited circumstances. *Ibid.* They also expressed the view that it "seem[s] impossible, if not implausible," that a school must provide the right to a hearing to challenge each of the "thousands of grades a student might receive over time" and maintain a record of access to each such grade. Pet. App. D5. (citing 120 Cong. Rec. 39,862 (1974)).

SUMMARY OF ARGUMENT

A. The definition of "education records" in FERPA is most naturally read as referring to records that are retained or preserved as institutional records, but not student homework or classroom work. Several features of the statutory

[5] The court of appeals held that the individual petitioners were entitled to qualified immunity from liability for money damages because it was not clearly established that the challenged grading practice violated FERPA. Pet. App. A2-A3; A29-A32.

definition—its use of the terms "records," "maintained," and "educational agency or institution or * * * person acting for such agency or institution"—demonstrate that Congress addressed FERPA to records that are maintained as an *institutional* matter by school officials. Student work like the homework and classroom tests at issue in this case are typically not kept by the teacher, let alone maintained as a school record. The fact that a particular classroom practice may disclose a grade given on a particular homework or classroom assignment does not mean that the practice violates FERPA. FERPA does not invalidate such common and longstanding teaching methods.

B. The structure of the Act also demonstrates that student homework and classroom work are not included in FERPA's definition of "education records." The Act's requirement that schools maintain a record of persons who have sought or obtained access to education records, and the interest of those persons in such information, confirms that student work is not covered. That section refers to "the school official and his assistants who are responsible for the custody of such records," thereby addressing records that are maintained on an institutional basis, not student work that teachers have in their separate classrooms. 20 U.S.C. 1232g(b)(4)(A). Also, if student homework were considered to be education records under FERPA, the Act's requirement that schools afford parents the right to inspect homework and classroom work, as well as a right to challenge the content of such papers, would have constituted a major departure from ordinary education practices. There is no indication that Congress intended such a change. That result also would be contrary to the manifest congressional intent that parents not be granted a right to challenge the substance of the grades given a student, but only "the accuracy of institutional records which record the grade which was actually given." 120 Cong. Rec. 39,862 (1974) (Joint

Statement of sponsors of amendment that added definition of "education records"). Moreover, FERPA's overall focus on policies and practices of educational agencies and institutions indicates that Congress did not intend to interfere with the varying pedagogical judgments made by individual teachers regarding the handling and use of homework and other student work in the classroom.

C. The statutory history of FERPA confirms that Congress intended that the Act apply to institutional records, not student work. As originally enacted, FERPA did not use the term "education records," but instead used three different descriptions to identify the materials that were subject to the three provisions regarding parental access, the right to a hearing, and the prohibition against release without parental consent. The most expansive description referred to "official records," including the material "incorporated into each student's cumulative record folder." Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 572. Congress subsequently enacted the definition of "education records" and inserted that term in place of the earlier descriptions of covered records. The statements on the floor of both the Senate and the House, as well as the Conference Reports, relating to FERPA both as originally enacted, and as amended by the insertion of the term "education records," all refer to "institutional records," "school records," and similar descriptions of the records at issue, but not to student homework or classroom work. Likewise, the concerns identified in the legislative record before Congress demonstrate that FERPA was addressed to institutional records, not student homework and classroom assignments.

ARGUMENT

"EDUCATION RECORDS" COVERED BY THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT CONSIST OF DOCUMENTS RETAINED OR PRESERVED AS INSTITUTIONAL RECORDS, NOT STUDENT HOMEWORK OR CLASSROOM WORK

The term "education records" in FERPA, 20 U.S.C. 1232g(a)(4)(A), refers to materials that are preserved or retained by an educational agency or institution, or someone acting for such agency or institution, as an institutional or official record of a student. That term does not include student work that is created, used, or kept in the classroom and is not made part of a student's institutional record. FERPA therefore does not prohibit such common and long-standing classroom practices as students' grading other students' homework or classroom work or students' calling out their grades in class on homework and classroom work. That conclusion is supported by the text of the statutory definition of "education records," numerous other provisions of FERPA that use the term "education records" or are otherwise worded in a way that refers to institutional records, FERPA's statutory history, and the legislative record before Congress.[6]

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[6] Although the Department of Education previously has expressed a view of "education records" that includes student work once it is collected by the teacher (see note 17, *infra*), we have concluded, on the basis of our review of the relevant statutory materials, as discussed below, that FERPA does not reach student work unless they are maintained as institutional records of the school.

A. FERPA's Definition Of "Education Records" Is Most Naturally Read As Referring To Records That Are Retained Or Preserved As Institutional Records

1. FERPA defines "education records" as the "records, files, documents, and other materials" containing information related to a student that "are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. 1232g(a)(4)(A)(i) and (ii). See App., *infra*, 3a-4a.[7] By defining the statute's scope in terms of records "maintained" by "an educational agency or institution," or by "a person acting for such agency or institution," Congress addressed FERPA to records that are maintained, as an *institutional* matter, by school officials, and that therefore are of some lasting significance outside the classroom. By contrast, the definition's text is not naturally read to encompass materials that are handled by numerous individual teachers as part of the ongoing educational process in their separate classrooms. It follows that the homework and classroom assignments of students are outside FERPA's focus on institutional records.

Other features of the statutory definition point in the same direction. The list of items in the definition—"records, files, documents, and other materials"—connote in this setting the school's *documentation* of a student's performance, not the actual performance (*i.e.*, the student's work product, such as homework and classroom assignments) itself. The word "record" means "evidence, knowledge, or information remaining in permanent form"; "an account in writing or print * * * or in some other permanent form * * * intended to perpetuate a knowledge of acts or

[7] Section 1232g of Title 20 of the United States Code is reproduced in full, as now in effect as amended by the Campus Sex Crimes Prevention Act, Pub. L. No. 106-386, Div. B, Tit. VI, §1601(d), 114 Stat. 1538, at App., *infra*, 1a-15a.

events"; or "something that serves to record." *Webster's Third New International Dictionary* (*Webster's*) 1898 (1993) (defs. 1c(1) and (2), 2). The words "files" and "documents" are naturally associated with institutional records but not with a student's homework, classroom assignments, artwork, and the like.

The final term in the definition—"materials"—is a generic term that should be understood to take its basic content from the other words in the series. See *Norfolk & W. Ry.* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1991) (discussing the maxim "*ejusdem generis*," which indicates that "when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration"); *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (explaining that the maxim "*noscitur a sociis*," which means that "a word is known by the company it keeps," "is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress"). Thus, the term "materials," read in this context and in light of standard tools of statutory construction, should be read to refer to data of a nature similar to "records," "files," and "documents," although the term presumably was intended to be expansive in identifying the *form* such records may take (*e.g.*, data stored permanently on computers on behalf of the institution). See 40 Fed. Reg. 1211 (1975) (explaining that, under FERPA, the "term 'record' is defined broadly to include all information and data maintained on a student in any medium").

That conclusion is further reinforced by the ordinary meaning of "maintain," which is "to keep in existence or continuance; preserve; retain." *Random House Dictionary of the English Language* 1160 (2d ed. 1987); see also *Webster's* 1362 (maintain: "1: to keep in a state of repair, efficiency, or validity: preserve from failure or decline"). FERPA's use of

the term "maintained"—in conjunction with "records," "files," "documents," and "institution"—in the definition of "education records" thus further supports an interpretation that refers to the official or permanent records that are retained by an institution, not student work that is handled by other students or the teacher or that is kept by the teacher in the classroom.

2. Under this interpretation of the statutory definition, FERPA applies, for example, to final course grades, student grade point averages, standardized test scores, attendance records, intelligence tests, psychological tests, aptitude and vocational tests, counseling records, career assessments, health and family history records, records of disciplinary proceedings and actions, and individualized education plans, because they are part of the institutional record of the student. FERPA does not, however, apply to the handling of the work product of students themselves, such as routine homework assignments or tests and other classroom activities, or to regulate or interfere with the ability of a school or teacher to carry out educational activities and functions.

The student homework and classroom tests at issue in this case, like many other assignments, often are not kept even by the teacher. Instead, such work is often returned to the students (or their parents), although actual practices may vary widely. For example, a teacher may have possession of student work (for reviewing or grading) before returning it to a student; a teacher may have other students grade student work; or a teacher may grade and keep student work in a file to review it with parents at a conference or to help the student or teacher assess the student's progress over the course of the school year. In none of those instances is the teacher "maintaining" "records," however, because the teacher does not retain or preserve the student work on a more permanent basis. *A fortiori* the teacher's possession of the student work at various times during the school year

does not constitute "maintaining" of the work as a documentation of the student's performance by the *institution*.[8]

The fact that a particular classroom practice may disclose a grade given on a particular homework or classroom assignment does not mean that the practice violates FERPA. Many educational practices inevitably reveal aspects of a student's academic abilities and are weighed as a part of a student's final course evaluation, including, for example, the public display of science projects, the posting of a classroom chart that records the number of books read by each student throughout the school year, students' handing back graded homework and classroom assignments, and teachers' posting of homework or classroom assignments. FERPA does not invalidate such common and longstanding teaching methods.[9]

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[8] Of course, if student homework and classroom work were, in fact, maintained as part of the institutional records of the school, they would be education records. For example, if a copy of a student's work is placed in a school's cumulative file concerning the student as an example of academic performance, that copy would be an education record. Or, if a school's final evaluation of a student in an art course consisted of a portfolio of selected pieces of the student's work and that portfolio was retained in the institution's records about the student, those pieces, too, would be education records. This case, however, does not involve such a practice.

[9] The court of appeals erred in assuming (Pet. App. A21-A24) that a teacher's grade book is an education record under FERPA. FERPA excludes from the definition of "education records" the records of instructional personnel that are in the "sole possession of the maker thereof" and are "not accessible or revealed to any other person except a substitute." 20 U.S.C. 1232g(a)(4)(B)(i). That exception applies to teacher grade books that are revealed only in the limited manner it allows, which presumably would include most teacher grade books. See 120 Cong. Rec. 39,862 (1974) (describing statutory exception for "[t]he private notes and other materials, such as a teacher's daily record book, created by individual school personnel (such as teachers, deans, doctors, etc.) as memory aides").

Under FERPA, if a teacher discloses his or her grade book to someone other than a substitute, the grade book would then become an education record. The teacher's disclosure of the grade book would not violate

B. The Structure Of FERPA Confirms That The Term "Education Records" Means Institutional Records, Not Student Homework Or Classroom Work

1. The meaning of "education records" as revealed in several respects by the statutory definition of that term is reinforced by a number of other provisions of the Act. The first is the provision that requires educational agencies and institutions to maintain a record of the individuals and entities (other than certain officials and teachers in the same school or school district) who request or obtain access to a student's "education records maintained by such educational agency or institution," 20 U.S.C. 1232g(b)(4)(A), thus reiterating the focus on *institutional* records, not classroom work. In addition, that section directs that the access records, which are to be "kept with the education records of each student," may be made available only to parents, school auditors, and *"the school official and his assistants who are responsible for the custody of such records."* *Ibid.* (emphasis added). By describing a "school official" and "his assistants" as the personnel responsible for the custody of education records, Section 1232g(b)(4)(A) underscores that "education records" means those records that are maintained on an institutional basis, not student work that individual teachers may have in their separate classrooms.

FERPA, however, if it was made to another school official or teacher of the same school or school district who has been determined by the institution "to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required." 20 U.S.C. 1232g(b)(1)(A) (allowing disclosure, without parental consent, of education records to such officials and teachers). By contrast, disclosure of a class roster listing grades from a teacher's grade book would violate FERPA because the disclosure would remove the grade book from the "sole possession" exception of Section 1232g(a)(4)(B)(i) and such disclosure of education records is not authorized under FERPA.

2. The structure of FERPA's provisions regarding parental inspection, hearings, and correction of records also demonstrate that Congress could not have intended for FERPA to apply to student homework and classroom assignments. The designation of a document as an education record under FERPA means not only that it is subject to restrictions against release without parental consent, but also that parents have a right to inspect and review the record, a right to a hearing to challenge the content of the record to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy rights of the student, and a right to insert a written explanation by the parents regarding the content of the records. 20 U.S.C. 1232g(a)(1)(A) and (2). In addition, as discussed above, a school must maintain a record of those who request or obtain access to an education record. 20 U.S.C. 1232g(b)(4)(A); 34 C.F.R. 99.32.

That FERPA grants such extensive procedural rights strongly supports the conclusion that the "education records" to which those rights attach consist only of the materials, typically permanent in nature, that are part of a school's institutional records pertaining to a student and therefore have the potential for the sort of lasting impact on the student that would warrant the formal procedural protections. As suggested by the judges who dissented from denial of rehearing en banc, it "seem[s] impossible, if not implausible," that all schools throughout the country must provide the right to a hearing to challenge each of the "thousands of grades a student might receive over time" and maintain a record of access to each piece of homework and classroom work. Pet. App. D5; see 34 C.F.R. 99.22 (explaining that minimum requirements for a hearing include that it be conducted by an individual, who may or may not be an official of the school, so long as he or she does not have a direct interest in the outcome, and that parents may present

evidence and be assisted or represented by another individual, including an attorney).

Imposing on schools throughout the nation the burden and cost of the procedural requirements for parental inspection, hearings, correction of records, and documentation of access with regard to every student homework assignment and classroom exercise would have constituted a major and intrusive departure from ordinary educational practices. There is no indication that Congress intended that the enactment of FERPA, including its definition of "education records," would have that effect. To the contrary, when Congress enacted the definition of "education records," the accompanying Joint Statement by Senators Buckley and Pell, the proponents of the amendment in the Senate, explicitly stated that the amendment was "not intended to overturn established standards and procedures for the challenge of substantive decisions made by the institution." 120 Cong. Rec. 39,862 (1974). The Joint Statement emphasized:

> There has been much concern that the right to a hearing will permit a parent or student to contest the grade given the student's performance in a course. That is not intended. It is intended only that there be procedures to challenge the accuracy of *institutional records which record the grade which was actually given.*"

Ibid. (emphasis added); see *ibid.* (stating that hearing procedures must be adapted to different circumstances and noting that "[i]t is not the intent of the Amendment to burden schools with onerous hearing procedures"). See also 20 U.S.C. 1232a (stating that no provision of any federal educational program shall be construed to authorize federal exercise of "direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system").

To be sure, in connection with a hearing concerning a student's course grade (which *is* an education record when entered in the student's institutional file), the parents might bring with them any homework or classroom assignments that have been returned to the student, in an effort to support their view that the course grade was inaccurately recorded in the school's institutional records. Parents might also ask to see any of their child's coursework that the teacher may still have in the classroom. But such ancillary reference to the student's work for evidentiary purposes does not transform the student work itself into "education records" under FERPA.

3. The wording of FERPA's substantive restrictions also shows that Congress focused on the policies and practices of schools and educational agencies, not the conduct of individual teachers. For example, the statutory provision regarding inspection and review of education records states that "[n]o funds shall be made available under any applicable program to any educational agency or institution *which has a policy* of denying, or which *effectively prevents*," parents from inspecting and reviewing their child's education records. 20 U.S.C. 1232g(a)(1)(A). Similarly, the provisions restricting the release of education records without parental consent are directed at "any educational agency or institution which *has a policy or practice* of permitting the release of education records" or of "releasing, or providing access to," personally identifiable information in education records. 20 U.S.C. 1232g(b)(1) and (2) (1994 & Supp. V 1999).

The policies and practices of a school district or school typically apply on a school-wide basis to the content and handling of institutional records containing such materials as student transcripts, standardized test scores, student health records, counselors' notes, and the like that are maintained by the school. By contrast, a teacher's own handling of student homework or classroom work that the teacher has

assigned in the exercise of his or her professional judgment typically depends on the teacher's view of the educational benefits of a variety of practices, *e.g.*, whether to grade certain assignments, whether to review certain student work individually or in a group, whether to post certain work, whether to keep certain work in the classroom for the student or teacher to review during the school year, etc. FERPA's focus on policies and practices of the institution indicates that Congress did not intend to interfere with those kinds of pedagogical judgments made by individual teachers.[10]

C. The Statutory History Of FERPA And The Problems Identified In The Record Before Congress Confirm Its Focus On Institutional Records

1. Congress enacted FERPA on August 21, 1974, as Section 513(a) of the Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 571. As initially enacted, FERPA did not use the term "education records" or contain a definition of that term. Instead, it used three different descriptions to identify the materials that were subject to the three statutory provisions regarding parental access, the right to a hearing, and the prohibition against release without parental consent. Significantly, the most expansive description of covered records provided parents a right to inspect "any and all *official* records, files, and data directly related to their children, including all material that is *incorporated into each student's cumulative record folder*, and intended for *school*

[10] Even if a school district had a policy of requiring teachers to keep certain student work in the classroom or in the teachers' own files during the course, term, or school year, that policy would not necessarily convert the work of the *students* into institutional or official records of the *school*. Such a school district policy might be directed to the pedagogical and professional practices of the individual teacher in the classroom, not to the official recordkeeping functions of the school district itself.

use or to be available to parties outside the school or school system, and specifically including, but not necessarily limited to, identifying data, academic work completed, level of achievement (grades, standardized achievement test scores), attendance data, scores on standardized intelligence, aptitude, and psychological tests, interest inventory results, health data, family background information, teacher or counselor ratings and observations, and verified reports of serious or recurrent behavior patterns." *Id.* at 572 (emphasis added); see also *ibid.* (providing parents with the right to a hearing to challenge the content of "their child's *school records*" and prohibiting release, without parental consent (except in limited circumstances), of "personally identifiable records or files") (emphasis added); see also, *e.g.*, 120 Cong. Rec. at 14,580-14,581, 14,584, 14,588, 14,589, 14,594 (discussion of FERPA in the Senate, referring to "school records"); *id.* at 26,106, 26,116, 26,125 (discussion of FERPA during House debate on the Conference Report, referring to "school files," "official records," "cumulative record folder," and "school records"); S. Conf. Rep. No. 1026, 93d Cong., 2d Sess. 186 (1974) (discussing parental rights under FERPA "to inspect their children's files and * * * to a hearing to contest their child's 'school records'"); 120 Cong. Rec. at 24,586 (H.R. Conf. Rep. No. 1211, 93d Cong., 2d Sess. (1974) (same)).

Thus, the subject of FERPA as originally enacted was institutional records, not a student's homework or classroom assignments. Questions nevertheless soon arose about FERPA's scope and operation. A few months later, on FERPA's effective date (November 19, 1974), various documents relating to FERPA were inserted into the Congressional Record by Senator Buckley, one of the principal sponsors of the law. See 120 Cong. Rec. at 36,528-36,535. One of those documents was a series of questions and answers that addressed concerns regarding FERPA, including

an inquiry about the breadth of the statutory term "any and all official records, files, and data," which described the materials to which parents were guaranteed access. This document stated that FERPA applied to "official records or files or data" that were "'intended for school use or to be available to parties outside the school or school system,'" *id.* at 36,533 (quoting statute), and explained that "[r]ecords 'intended for school use' should generally include those established by an office or a division of the school for the use of that office or division," *ibid.* The document further emphasized that "[t]he definition of the words 'official' and 'intended for school use' are of major importance," that regulations were being developed, that consideration may properly be given to the "use to which the files are put," and that the law should be implemented "with an attitude of reasonableness." *Ibid.*

The question-and-answer document submitted by Senator Buckley also addressed the question whether FERPA required a school to provide a hearing to a student who wished to challenge a grade received on an essay. 120 Cong. Rec. at 36,533. The response dismissed that concern as "another red herring," explaining that "[t]he question of a grade is a matter to be taken up with the teacher involved, and perhaps the department chairman," and that hearings are for instances of "erroneous information (as a grade incorrectly recorded), anecdotal comments or evaluations by teachers, or personal information on the student or parents which probably has no business being in such a file." *Ibid.*

Against that backdrop, on December 19, 1974, Congress enacted an amendment, retroactive to the original effective date,[11] to resolve ambiguities that had been identified in FERPA, including "[c]larifying the definition of the

[11] See Act of Dec. 31, 1974, Pub. L. No. 93-568, § 2(a) and (b), 88 Stat. 1858-1862; 20 U.S.C. 1232g note.

education records involved." 120 Cong. Rec. at 41,392; *id.* at 40,459. As part of that amendment, Congress added the definition of "education records," and inserted that term in place of the list of materials to which parents were accorded a right of access, and in place of the description of the records that were to be subject to challenge, the right to a hearing, and not to be released without parental consent. 88 Stat. 1859-1860. The Conference Report stated that FERPA, as originally enacted, "contain[ed] a laundry list of items which are to be available to parents and students" and made "inconsistent references to 'personally identifiable information, school records,' etc.," and explained that the new amendment "uses the generic designation, 'education records' and defines that term." S. Conf. Rep. No. 1409, 93d Cong., 2d Sess. 10 (1974); 120 Cong. Rec. at 40,549 (same).

The Joint Statement presented by Senators Buckley and Pell, the proponents of the amendment, similarly explained that use of the generic term "'education records,' eliminat[ed] the long list of illustrative examples" contained in FERPA as originally enacted. 120 Cong. Rec. at 39,862. Consistent with the manifest intent of Congress simply to clarify the meaning of "education records" covered by the Act, the Joint Statement and other statements by Members of Congress during the debate on the amendment refer to "institutional records," "school records," and "documents * * * used by the institution in making institutional decisions concerning a student." See, *e.g.*, *id.* at 39,858-39,859, 39,862-39,863, 41,394. There is, by contrast, no indication in the legislative history that Congress intended to depart from the focus of FERPA as originally enacted on "official" records, the student's "cumulative file," and "school records." See also 40 Fed. Reg. at 1208 (Secretary's notice of proposed rulemaking to promulgate regulations to implement FERPA provisions that establish certain rights regarding students' "official records").

2. The legislative record before Congress at the time FERPA was enacted also supports the conclusion that Congress intended FERPA to apply to institutional records of students, not to student homework or classroom assignments. That record demonstrates that Congress was concerned with the rapid expansion of information included in students' institutional records and the potential for misuse of such information by schools, employers, and government agencies, to which such information was regularly released. Senator Buckley explained that "[w]hen parents and students are not allowed to inspect school records and make corrections, numerous erroneous and harmful material[s] can creep into the records. Such inaccurate materials can have devastatingly negative effects on the academic future and job prospects of an innocent, unaware student." 120 Cong. Rec. at 14,580.

Representative Kemp had raised concerns about protecting the privacy rights of parents and students in school records, citing an article that traced the "growth of student records into an all-inclusive dossier." The article discussed instances in which parents were unable to gain access to schools files and reported occasions on which schools had disclosed files that contained misleading or inappropriate information about a student or his family. 120 Cong. Rec. at 9369-9370; see also *id.* at 9633-9635, 9645-9646) (reproducing Diane Divoky, *Cumulative Records: Assault on Privacy*, Learning (Sept. 1973)); *id.* at 36,528-36,531 (same)). Representative Kemp quoted the article's description of a typical student record compiled in the New York City school system—a description limited to the official school file—and spoke of the "potential misuse by disclosure of extensive

information about pupils, maintained in the various public and private school systems." *Id.* at 9369.[12]

The article discussed by Representative Kemp also referred to a survey by the Russell Sage Foundation, which had found that "the [school] systems maintained[,] as part of their permanent files" a wide range of information on students; that such information was accessible to federal law enforcement offices in more than half the school systems; but that parents had access to the whole file in less than ten percent of the systems. 120 Cong. Rec. at 9634. The article then summarized proposed record-keeping guidelines (developed by the Russell Sage Foundation as a result of the survey) that recommended: no collection of data from students without parental consent; maintenance of only basic data on a permanent record card, with other information periodically reviewed and destroyed where appropriate; verification of the accuracy of the data in pupil records; parental access to their child's whole record, "including the right to challenge the accuracy of the information found therein"; and no access to pupil data, without parental consent, by persons other than school personnel who deal with the child. *Ibid.*[13]

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[12] That New York City school record contained a wide range of materials, including grades, standardized test scores, and health records, as well as an "anecdotal file" by teachers on student behavior, and reports by counselors, psychologists, and social workers. 120 Cong. Rec. at 9370.

[13] The Russell Sage Foundation's publication, *Guidelines for the Collection, Maintenance & Dissemination of Pupil Records* (1970) (*Guidelines*), was discussed elsewhere in the legislative record. See, *e.g.*, 120 Cong. Rec. at 13,952; 14,582. The Guidelines' discussion of pupil records focuses on "school records." *Guidelines* 13-14, 26-27, 32, 36-37. The only reference to student work is a reference to "[w]ork *samples*" as one type of information that may be contained in pupil records. *Id.* at 48 (emphasis added); see also *id.* at 20-21, 48. In a speech in 1975, Senator Buckley explained that the recommendations in the Guidelines "in large part formed the basis" of the amendment that he proposed and that became FERPA. See 121 Cong. Rec. 13,990 (1975).

Neither Representative Kemp nor the article made any mention of homework or classroom work as a subject of concern. The article noted only that "*samples* of student work" (120 Cong. Rec. at 9634) are sometimes included by schools in their permanent files on students—where they would be "education records."[14]

When Senator Buckley thereafter introduced FERPA on the floor of the Senate (as an amendment to the Education Amendments of 1974), he spoke of the problems posed by "secret school records" and cited a similar article by the same author. 120 Cong. Rec. at 13,951; see also *id.* at 13,953 (reproducing Diane Divoky, *How Secret School Records Can Hurt Your Child*, Parade Magazine (Mar. 31, 1974)). That article expressed concerns about student records that include not just "hard data, such as IQ scores, medical records, and grades," but also "soft data," such as teacher anecdotes, notes on parent interviews, and disciplinary reports that are "routinely filed away in school offices or stored in computer data banks." 120 Cong. Rec. at 13,953; see also *id.* at 13,954, 14,580, 17,718 (citing a handbook prepared by the National Committee for Citizens in Education, J. William Rioux & Stuart A. Sandow, *Children, Parents and School Records* (May 1974), that addressed official, institutional files).[15]

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[14] Representative Kemp also entered into the Congressional Record a research paper that discussed strategies for preventing abuses of information contained in "school records." See 120 Cong. Rec. at 9928-9930, 9985-9987, 10,142-10,144 (reproducing Sarah C. Carey, *Students, Parents and the School Record Prison: A Legal Strategy for Preventing Abuse, reprinted in* 3 J.L. & Educ. 365 (July 1974)). The article discussed students' "permanent file[s]" and criticized the "voluminous and subjective or unverifiable material that goes into a child's file in many school systems." *Id.* at 9929.

[15] The congressional debates on FERPA also addressed concerns about students being subjected to psychological and other testing without parental consent (*e.g.*, 120 Cong. Rec. at 13,951), and the gathering of data from students, including by federal agencies, through questionnaires about very personal habits of the students and their families (*e.g.*, *ibid.*). The provision introduced to address the first concern was defeated on the Senate floor, *id.* at 14,595, but the provision addressing the second concern was enacted as part of FERPA, see 20 U.S.C. 1232g(c).

Neither Senator Buckley nor the article expressed any concern about student homework or classroom work.[16]

Thus, the legislative record demonstrates that Congress was concerned that institutional records maintained by schools on students contained too much misleading and inappropriate information that parents could not review, and that such information was being disclosed by schools to other people making decisions about the student, such as employers and government agencies. Congress enacted FERPA to respond to those concerns and, accordingly, addressed the statute's protections to institutional records.[17]

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[16] Senator Buckley also had printed in the Congressional Record several sample "parental consent" forms to demonstrate that parental consent requirements would not cause undue problems. See 120 Cong. Rec. at 13,952, 13,954; see also *id.* at 14,581-14,582. The sample forms were from the Russell Sage Foundation Guidelines, see note 13, *supra*, and referred to "permanent pupil records" that included materials such as the official administrative record, standardized test scores, teacher and counselor observations, and family background data. 120 Cong. Rec. at 13,954.

[17] The Department of Education, in a letter issued by its Family Policy Compliance Office (FPCO) in 1998, expressed the view that FERPA does not "prohibit teachers from allowing students to grade a test or homework assignment of another student or from calling out that grade in class." Pet. App. F4. On the other hand, a recent review of FPCO's files reveals that on a number of occasions the Department has issued technical assistance letters and letters of findings that conclude that the term "education records" includes student work once it is collected by a teacher. Although that analysis does not contradict the conclusion that the practice at issue in this case does not violate FERPA, such a practice would have been perceived by FPCO to violate FERPA if the teacher had collected the student work and then handed the work back for students to correct

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 2001

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the work of other students. See Letter from LeRoy S. Rooker, Director, Family Policy Compliance Office, to Mr. Julio Almanza (Jan. 28, 2000). To the extent these and related letters may be regarded as inconsistent with the position set forth in this brief (*e.g.*, treating teacher grade books as education records that are not covered by the "sole possession" exception, 20 U.S.C. 1232g(a)(4)(B)(i), see Letter from LeRoy S. Rooker, Director, Family Policy Compliance Office, to Mr. Andrew Marko (June 25, 1998)), this brief represents the position of the United States on the issue.

The brief filed at the petition stage in response to the Court's invitation stated (at 13-14, 17-19) that, in response to the court of appeals' decision in this case, the Department of Education had determined that it would issue regulations or formal guidance setting forth a more detailed analysis of the meaning of "education records" under FERPA and the application of FERPA to a variety of practices, including the grading practice at issue in this case. In light of the Court's decision to review this case, however, the Department determined that since the Court would be addressing the applicability of FERPA to the education practice at issue in this case and perhaps the meaning of "education records" more broadly, it would not at this time issue such regulations or guidance. Accordingly, this brief represents the position of the United States in this case.

APPENDIX

Section 1232g of Title 20 of the United States Code provides:

§ 1232g. Family educational and privacy rights

(a) Conditions for availability of funds to educational agencies or institutions; inspection and review of education records; specific information to be made available; procedure for access to education records; reasonableness of time for such access; hearings; written explanations by parents; definitions

(1)(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(B) No funds under any applicable program shall be made available to any State educational agency (whether or not that agency is an educational agency or institution under

this section) that has a policy of denying, or effectively prevents, the parents of students the right to inspect and review the education records maintained by the State educational agency on their children who are or have been in attendance at any school of an educational agency or institution that is subject to the provisions of this section.

(C) The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:

(i) financial records of the parents of the student or any information contained therein;

(ii) confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended;

(iii) if the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (D), confidential recommendations—

(I) respecting admission to any educational agency or institution,

(II) respecting an application for employment, and

(III) respecting the receipt of an honor or honorary recognition.

(D) A student or a person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (C), except that such waiver shall apply to recommendations only if (i) the student is,

upon request, notified of the names of all persons making confidential recommendations and (ii) such recommendations are used solely for the purpose for which they were specifically intended. Such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4)(A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which—

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

(B) The term "education records" does not include—

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

(ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or

(iv) records on a student who is eighteen years of age or older, or is attending an institution of post-secondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be

personally reviewed by a physician or other appropriate professional of the student's choice.

(5)(A) For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

(6) For the purposes of this section, the term "student" includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

(b) Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of federally-supported education programs; record-keeping

(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following—

(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required;

(B) officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C)(i) authorized representatives of (I) the Comptroller General of the United States, (II) the Secretary, or (III) State educational authorities, under the conditions set forth in paragraph (3), or (ii) authorized representatives of the Attorney General for law enforcement purposes under the same conditions as apply to the Secretary under paragraph (3);

(D) in connection with a student's application for, or receipt of, financial aid;

(E) State and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to State statute adopted—

(i) before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve the student whose records are released, or

(ii) after November 19, 1974, if—

(I) the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve, prior to adjudication, the student whose records are released; and

(II) the officials and authorities to whom such information is disclosed certify in writing to the educational agency or institution that the information will not be disclosed to any other party except as provided under State law without the prior written consent of the parent of the student.[1]

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted;

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[1] So in original. The period probably should be a semicolon.

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of Title 26;

(I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons; and

(J)(i) the entity or persons designated in a Federal grand jury subpoena, in which case the court shall order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished to the grand jury in response to the subpoena; and

(ii) the entity or persons designated in any other subpoena issued for a law enforcement purpose, in which case the court or other issuing agency may order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished in response to the subpoena.

Nothing in clause (E) of this paragraph shall prevent a State from further limiting the number or type of State or local officials who will continue to have access thereunder.

(2) No funds shall be made available under any applicable program to any educational agency or institution

which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection, unless—

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(E) except as provided in paragraph (1)(J), such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, or (C) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally-supported education programs, or in connection with the enforcement of the Federal legal requirements which relate to such programs: *Provided*, That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4)(A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student. If a third party outside the educational agency or institution permits access to information in violation of paragraph (2)(A), or fails to destroy information in violation of paragraph (1)(F), the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years.

(5) Nothing in this section shall be construed to prohibit State and local educational officials from having access to student or other records which may be necessary in connection with the audit and evaluation of any federally or State supported education program or in connection with the enforcement of the Federal legal requirements which relate to any such program, subject to the conditions specified in the proviso in paragraph (3).

(6)(A) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing, to an alleged victim of any crime of violence (as that term is defined in section 16 of Title 18), or a nonforcible sex offense, the final results of any disciplinary proceeding conducted by such institution against the alleged perpetrator of such crime or offense with respect to such crime or offense.

(B) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence (as that term is defined in section 16 of Title 18), or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.

(C) For the purpose of this paragraph, the final results of any disciplinary proceeding—

(i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and

(ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student.

(7)(A) Nothing in this section may be construed to prohibit an educational institution from disclosing information provided to the institution under section 14071 of Title 42 concerning registered sex offenders who are required to register under such section.

(B) The Secretary shall take appropriate steps to notify educational institutions that disclosure of information described in subparagraph (A) is permitted.

(c) Surveys or data-gathering activities; regulations

Not later than 240 days after October 20, 1994, the Secretary shall adopt appropriate regulations or procedures, or identify existing regulations or procedures, which protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

(d) Students' rather than parents' permission or consent

For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

(e) Informing parents or students of rights under this section

No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution effectively informs the parents of

students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

(f) Enforcement; termination of assistance

The Secretary shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this chapter, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means.

(g) Office and review board; creation; functions

The Secretary shall establish or designate an office and review board within the Department for the purpose of investigating, processing, reviewing, and adjudicating violations of this section and complaints which may be filed concerning alleged violations of this section. Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

(h) Disciplinary records; disclosure

Nothing in this section shall prohibit an educational agency or institution from—

(1) including appropriate information in the education record of any student concerning disciplinary action taken against such student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community; or

(2) disclosing such information to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student.

(i) Drug and alcohol violation disclosures

(1) In general

Nothing in this chapter [20 U.S.C.A. § 1221 et seq.] or chapter 28 of this title [20 U.S.C.A. § 1001 et seq.] shall be construed to prohibit an institution of higher education from disclosing, to a parent or legal guardian of a student, information regarding any violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance, regardless of whether that information is contained in the student's education records, if—

(A) the student is under the age of 21; and

(B) the institution determines that the student has committed a disciplinary violation with respect to such use or possession.

(2) State law regarding disclosure

Nothing in paragraph (1) shall be construed to supersede any provision of State law that prohibits an institution of higher education from making the disclosure described in subsection (a).